

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

IInd Appeal No.19 of 2011

Date of hearing : 09.03.2012

Appellant: Mrs.Sherbano.

Respondent: Kamil Muhammad Khan

Mr.Mustafa Lakhani, Advocate for the Appellant

Nemo for the Respondent

MUHAMMAD ALI MAZHAR. J - This IInd Appeal has been preferred against the impugned judgment dated 12.11.2010, passed

by Vth Additional District Judge Karachi East in Civil Appeal No.84 of 2009, whereby the judgment and decree passed by VIIIth Senior Civil Judge, Karachi (East) in Civil Suit No.1053 of 2006 was maintained and the first appeal was dismissed.

2. It appears from the record that through out the proceedings, the respondent never appeared in the courts below and in this second appeal also, despite substituted service of notice in the newspaper Daily Jang, Karachi dated 7.9.2011, the respondent failed to appear. The appellant had filed the Civil Suit No.1053 of 2006 for seeking the following relief(s):

- A. To direct the defendant to transfer the residential Plot No.D-36, measuring 1000 square yards with construction thereon situated in Block-8, Works Cooperative Housing Society, Karachi Development Authority Scheme No.24, Gulshan-e-Iqbal Karachi by completing all the formalities required by the Works Cooperative Housing Society and on his failure the Nazir of this hon'ble Court be directed to transfer the said property in favour of the plaintiff by completing all the formalities required by the Works Cooperative Housing Society Limited, Karachi in the name of the plaintiff.
- B. Award costs of the suit and / or.
- C. Grant any other relief or reliefs as this hon'ble Court may deem fit and proper in the circumstances of the case.

3. The brief facts of the case are that the appellant filed a civil suit for specific performance of contract in which cause of action stated to have accrued on 24.4.1995, when initially an agreement to sell was executed between the parties and finally cause of action accrued on 15.5.2006, when the respondent was called upon to execute conveyance deed and a notice was served upon him through learned counsel for the appellant on 15.5.2006.

4. The agreement to sell available at page 19 of the court file shows that the entire consideration was paid by the appellant and physical vacant possession of residential Plot No.D-36, Works Cooperative Housing Society, Karachi was handed over to the appellant by the respondent.

5. In paragraph 7 of the agreement, the Vendor undertook to transfer and assign unto the Vendee the said property and also agreed to sign and execute all documents, whenever required by the Vendee/Purchaser to effectuate the transfer. Apparently there was no date exact agreed for executing the conveyance deed or transfer deed in the agreement. For ready reference, Clause 7 of the agreement is reproduced as under:-

“7. That the Vendor/Seller does hereby undertake and agree to transfer and assign unto the Vendee/Purchaser the said property and to be ready and prepared to sign and execute all documents, applications, papers, undertaking, indemnity bond, affidavits, statement, etc. and to appear and depose before the authorities concerned whenever required by the Vendee/Purchaser to effectuate the transfer/mutation of the said property/plot in favour of the Vendee/Purchaser or her nominee.”

6. In paragraph 4 of the agreement, the Vendor also undertook to execute an irrevocable general power of attorney of the said property in favour of the Vendee’s nominee Abdul Karim vesting in him all the powers in respect of the said property and agreed to cause its registration before Sub-Registrar within two days from the date of execution hereof. Clause 4 of the agreement reads as under:-

“4. That the Vendor/Seller has also this day at the request of Vendee/Purchaser, executed an Irrevocable General Power of Attorney of the said property in favour of the Vendee/Purchaser’s nominee Mr.Abdul Karim (holder of N.I. Card No.456-33-028828), son of Haji Ali Muhammad giving him all the powers in respect of the said property and caused its registration/shall cause its registration before sub-registrar of properties within 2 days from the date of execution hereof.”

7. The aforesaid clause shows that two days time limit was agreed between the parties for the execution of registered power of attorney before the concerned Registrar and since this clause was strictly dedicated to the execution of power of attorney without mentioning any date for the execution of conveyance deed, therefore, in my view for all intent and purposes this clause was only confined to the execution of general power of attorney and not to the registration of the conveyance deed which was separately provided and agreed under clause 7 of the agreement to sell.

8. The learned counsel for the appellant argued that since the respondent/defendant was ex-parte in the trial court, therefore, the plaintiff was directed to file affidavit in evidence, which was filed, but the learned trial court dismissed the suit being time barred for the reason that the sale agreement was executed between the plaintiff and the defendant on 24.4.1995 and the plaintiff/appellant had filed the suit on 10.10.2006 after 11 years and in the intervening period remained silent therefore, the suit was considered to be time barred under Article 113 of the Limitation Act which provides three years limitation for filing a suit for specific performance of contract.

9. The judgment and decree of the trial court was challenged in appeal where too the respondent was ex-parte. However, the learned appellate court relying upon paragraph 4 of the agreement observed that husband of the appellant in whose favour the general power of attorney was executed was bound to execute lease deed in favour of the appellant within 02 days from the date of execution of agreement to sell, but the appellant has miserably failed to utter a single word as to why such act has not been done in terms of agreement, hence, the appeal was also dismissed keeping in view paragraph 4 of the agreement.

10. In my view, paragraph 7 of the agreement relates to execution and transfer of property in question while paragraph 4 of the agreement was specifically dedicated to the execution of power of attorney in the name of vendee's nominee. The agreement to sell unequivocally shows that the appellant is in possession of the property in question and the sale consideration was also paid and acknowledged and the only question relates to the execution of conveyance deed. The suit for specific performance was filed after the death of attorney and the trial court failed to consider that in the agreement no time was fixed for execution of conveyance deed by the vendor and in the plaint, it was averred that the vendor/defendant was approached numerous times for the transfer of property who kept the appellant on false hopes, resultantly, a notice was issued on 15.5.2006 which was in fact the trigger point

and if the contents of plaint and date of notice would have been kept into consideration properly, the courts below perhaps might not have held the suit is barred by limitation. Under Article 113 of the Limitation Act, period of three years is provided for filling a suit for specific performance of a contract and time begins to run from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

11. It is well settled that for the rejection of plaint under Order 7 Rule 11 CPC or dismissal of suit under Section 3 of the Limitation Act, the contents of the plaint are to be looked into and if from the statement in the plaint, the suit appear to be barred by limitation, that plaint shall have to be rejected. The appellant/plaintiff had properly described the cause of action in the plaint with specific events and dates and in view of the cause of action described in the plaint, the suit does not appear to be time barred. It is also well settled that whenever a question of limitation appears to be a mix question of law and facts, then to advance the cause of justice, it is always considered more apt to decide the cause on merits rather than non suiting a person on technical knockout. The proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a

certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his. If any authority is needed, one may refer to PLD 1963 SC 382.

12. The learned trial court as well as appellate court both have also failed to consider the application and implication of Section 53-A of the Transfer of Property Act, which relates to a part performance and in this case not only the appellant has paid entire sale consideration but she is also in peaceful vacant possession with original title documents. Section 53-A of the Transfer of Property Act in case of part performance protects the right and interest of transferee as under:-

Section 53-A. Part performance. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has, performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

13. At this juncture, I would like to refer to **1992 SCMR 1265 (Naib Subedar Taj Muhammad v. Yar Muhammad Khan and 06 others)**. In this case, it was held that where all the conditions laid down in Section 53-A were satisfied, then even if the contract was not registered, the transferor or any person claiming under him could not enforce any right in respect of the property which the transferee had taken possession of except such right which a transferor was entitled to enforce by virtue of the contract. So far as the applicability of section 53-A of the Transfer of Property Act is concerned, it depends upon the following factors:-

(i) There is a contract in writing signed by the transferor in respect of an immovable property;

(ii) From the writing, transfer can be ascertained with reasonable certainty;

(iii) in part performance of the contract, the transferee has taken possession of the property or any part thereof or if he was in possession, he continues to be in possession in part performance of the contract and has done some act in furtherance of the contract; and

(iv) The transferee has performed or is willing to perform his part of the contract.

(v) If all these conditions are satisfied, then even if the contract is not registered, the transferor or any person claiming under him cannot enforce any right in respect of the property of which the transferee has taken possession except such right, which a transferor is entitled to enforce by virtue of the contract.

14. Under Section 100 of C.P.C, it is provided that second Appeal shall lie to the High Court from every decree passed in appeal by a court subordinate to High Court on the grounds namely (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in

the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. Likewise, Section 103 CPC, provides that in any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.

15. The object of section 103 CPC is to avoid the necessity of remanding a case where an issue of fact necessary for the disposal of the case has not been determined or where such an issue has been wrongly determined. Where the evidence or the material available on record is sufficient for final decision on the issues of law and fact the High Court under section 103 CPC empowered to determine and competent to interfere. It is clear beyond any shadow of doubt that in clause 3 of the agreement to sell, the vendor admitted to have received the entire sale consideration and also handed over physical peaceful vacant possession of the entire property along with original title documents and under clause (7) he also undertook to sign and execute all documents, applications, papers, undertaking, indemnity etc. before the authorities concerned whenever required by the vendee to effectuate the

transfer of the property in question in favour of vendee. However, in order to safeguard the interest of the vendee, the vendor also executed general power of attorney in favour of the nominee of vendee who was her late husband and since the attorney expired therefore, the vendee through her counsel served a notice upon the vendor to transfer the property in question in terms of agreement to sell. Both the courts below failed to consider the actual controversy but the suit was dismissed being barred by limitation and the decree was affirmed in appeal without considering the fact that the appellant in this case performed her obligations much more than a part performance and nothing is required to be done by the vendee, therefore, the vendor/transferor or any other person claiming under him is debarred from enforcing any right other than the right expressly provided by the terms of contract. Since the possession has been handed over with original title documents in lieu of receipt of entire sale consideration, perhaps this is the main reason for which the vendor/respondent remained ex-prate throughout the proceedings.

16. As a result of above discussion, this second appeal is admitted for regular hearing and allowed. The judgment and decree passed by the learned VIIIth Senior Civil Judge, Karachi East in Suit No.1053/2006 and the judgment passed by the appellate court in Civil Appeal No.84/09 are set aside and suit of the

appellant/plaintiff is decreed in terms of prayer clause "A" of the
plaint.

Judge